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In the

Supreme Court of the United States

October Term 1973

No. 73-1477

BOBBY A. PRICE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on January 14, 1974, not be granted.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 214 Va. 490, 201 S.E.2d 798 (1974) and is set forth in the Appendix to the Petition for a Writ of Certiorari at

pages 40-46. This opinion was issued after briefs and oral argument subsequent to this Court granting a prior Writ of Certiorari, vacating the judgment and remanding the case to the Virginia Supreme Court. The prior opinion of the Supreme Court of Virginia may be found at 213 Va. 113, 189 S.E.2d 324 (1972), and it is set forth in the Appendix to the Petition for a Writ of Certiorari at pages 47-61.

JURISDICTION

Petitioner asserts that the jurisdiction of the Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Whether the Virginia Obscenity Statute under which the defendant was convicted and sentenced to prison is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution because it is unconstitutionally vague and because it fails to meet the requirements of the First and Fourteenth Amendments to the United States Constitution.

II. Whether the petitioner was denied his basic rights under the First and Fourteenth Amendments to the United States Constitution and his right to due process of law secured by the Fourteenth Amendment to the United States Constitution by his conviction of "Exhibiting an obscene motion picture" and whether, under the law as it stood at the time of petitioner's conduct, the motion picture was obscene considering its content together with the fact that its dissemination was limited to adults and that adequate precautions were taken to prevent intrusions upon the sensibilities of unwilling viewers.

III. Whether the petitioner was denied his rights under the First and Fourteenth Amendments to the United States Constitution by the trial court's instrucion of the jury that if it found the defendant was the manager of the North Theater and if it found the motion picture was obscene beyond reasonable doubt, it should find the defendant guilty as charged, which instruction totally omitted the requirement of knowledge or scienter on the part of the defendant; and whether the instruction, held erroneous by the Supreme Court of Virginia, was harmless beyond a reasonable doubt because the motion picture was X-rated and because the defendant hired a security guard to insure that persons under twenty-one years of age were not admitted to the motion picture.

IV. Whether the trial court violated petitioner's rights under the First and Fourteenth Amendment to the United States Constitution by refusing to instruct the jury to consider in determining if the film was obscene whether or not the defendant took adequate precautions to insure that the film could not be viewed by juveniles and took adequate precautions to see that no unwilling adult was exposed to the film and used no pandering or offensive advertising to promote the film.

V. Whether the trial court deprived petitioner of due process of law in violation of the Fourteenth Amendment to the United States Constitution by instructing the jury that the issue of obscenity should be determined by the *Roth-Memoirs* tests and by failing to explain those tests in any way.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 18.1-230, Code of Virginia (1950), as amended:

Obscene exhibitions and performances—Every person who knowingly:

(1) Produces, promotes, prepares, presents, manages, directs, carries on or participates in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided that no employee of any person or legal entity operating a theater, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theater or an officer of such entity, and has no

financial interest in such theater other than receiving salary and wages; or

(2) Owns, leases or manages any theater, garden, building, structure, room or place and leases, lets, lends or permits such theater, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or who fails to post prominently therein the name and address of a person resident in the locality who is the manager of such theater, garden, building, structure, room or place shall be guilty of a misdemeanor.

Section 18.1-227, Code of Virginia (1950), as amended:

§ 18.1-227. 'Obscene' defined.—The word 'obscene' where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

STATEMENT OF THE CASE

On January 5, 1971, Bobby A. Price, the manager of the North Theater in Danville, Virginia was indicted for showing the motion picture "Anomalies." At the same time, the Commonwealth asked the Court for a show cause order and a temporary injunction. The defendant, by counsel, consented to both the show cause order and the temporary injunction, and agreed to allow the Commonwealth to use the film in preparing its case. The Commonwealth then asked a representative cross-section of the community to view the film.

The first witness for the Commonwealth was Charles D. Ragland, a retired banker who has served for 35 years on

the Community Chest and United Fund Boards. During his 53 years in Danville, Mr. Ragland has discussed community standards with many people (T. 10, 21, 27-28). Based upon his knowledge of and association with people in the community, he concluded the film "Anomalies" was an affront to community standards (T. 22-23). Contrary to the assertions of the defendant's brief, Mr. Ragland was asked whether he was testifying to his own standards or those of the community. He specifically stated that it was the community that was affronted by this attempt to arouse sexual passions (T. 11-13, 22-23).

Kirby Wright, a visiting teacher with the Pittsylvania County Schools, testified that he has spent his entire life of 35 years living in different sections of the City of Danville. After seeing the movie, he concluded that its purpose was to suggest that the abnormal acts portrayed on the screen were proper to perform (T. 34-36). This conclusion was based, in part, on the narrator's comment that "the person next to you might be willing to perform such acts" (T. 35). In addition, the movie approvingly suggested that venereal diseases could not be contacted and the girls would not have to worry about pregnancy if the acts were performed as the movie portrayed them (T. 35).

The witness found no social or educational value associated with the movie. Its effect "would lower the social standards of my community" (T. 35). In addition, he was convinced that the movie could encourage some people to try abnormal sex acts or probably commit a crime (T. 35). Based upon his knowledge of the community, Kirby Wright felt the film definitely affronted community standards (T. 38).

Russell Brachman, a biologist and teacher at Averett College, testified that during his 13 years in Danville he had

resided in several different places in the community (T. 43-47). After graphically describing what the film purported to convey, Mr. Brachman evaluated the film as an appeal to "our lower animal instincts of satisfying perhaps, those who have to satisfy some sort of sex need, might be aroused by this film" (T. 47-48). The movie had no redeeming social value, and any education significance that might be attached to the terms used was dissipated by the groans of the partners engaged in the sex acts (T. 48-49). After stating that he had been in contact with people from all walks of life while a resident of Danville, Brachman concluded the film was an affffront to community standards (T. 51-52).

In response to defense counsel's question, Mr. Brachman stated that the film was meant for propaganda, and that he was not aware of any educational film that just stressed the abnormal as did this movie (T. 54-56). The witness was also convinced that "some could be aroused by the film to the point where they wouldn't be satisfied inside the theatre and would come outside and then they would vent their emotions on someone outside" (T.64).

The next witness for the Commonwealth was E. L. Motley, who has lived in Danville for 55 years (T. 61). He is principal of George Washington High School, the only senior high school in Danville. Previous to this assignment he had taught in the Danville Public Schools, as well as having been principal of three other schools located in different areas of the city.

Mr. Motley stated that "Anomalies" appealed "to passions, abnormal behavior and responses under abnormal situations" (T. 68). The scenes portraying transodentalism and exhibitionism were described as being debase (T. 68). When asked what the dominant theme of the movie was, the witness responded by stating that "it takes the sex and

makes a morbid, artificial response rather than something in our normal health and psychology which is beautiful and normal" (T. 69). The picture had absolutely no redeeming social or educational value (T. 69), and its appeal was to the sadist (T. 69).

Mr. Motley graphically illustrated the opportunities he has had to evaluate community standards. For many years he has served on the State PTA Board where he participated in the evaluation of many books and movies. In fact, one of the Board's main objectives is the evaluation of books and movies. In addition, he has been in hundreds of conversations with parents and students concerning the use of books and movies that they felt were improper for the students (T. 70-71). Pursuant to these conversations he actually examined many of the movies and books in question (T. 72). After giving this background for being in a position to evaluate community standards, Mr. Motley stated "the movie was an affront to community standards" (T. 72, 81). In fact, it was dangerous to the community (T. 72).

In response to defense counsel's question, Mr. Motley admitted having seen the motion pictures "Three in the Attic" and "Who Killed Sister George" and while he felt they were not acceptable to the community, he was convinced that "Anomalies" was "the most morbid film that I've seen in Danville" (T. 81).

W. H. Funk, III, manager of the Home Beneficial Life Insurance office, has lived in Danville four years (T. 84). The movie was so offensive and morbid that he was embarrassed to describe it before a woman member of the jury (T. 85-86). It had no educational value (T. 86).

In his business, Funk associates with a cross-section of the entire community. Thus he was able to categorically state

that "Anomalies" was an affront to community standards (T. 89). On cross-examination he pointed out that he has lived in Richmond, Newport News, Petersburg, and Prince George County, Virginia, and that the movie in question was inconsistent with the standards of the State of Virginia (T. 91). He specifically stated "it does not conform with the standards in the City of Danville or this community or other communities in which I have lived" (T. 93).

Fred Evans, a resident of Danville for 40 years and the Executive Director of the United Fund of Danville and Pittsylvania County (T. 102-103), described "Anomalies" as a portrayal of sex in such a way as to indicate that these abnormal acts were normal (T. 103). The dominant theme; if you could call it a theme, was an appeal "to the animal nature of the human being" (T. 103-104). It was "just a portrayal of sex in its base form and had no educational value to it" (T. 105-106). After describing the movie as being harmful to the community and without redeeming social value, Evans was asked on cross-examination to define a redeeming social value (T. 104, 111-112). He replied that "in my opinion redeeming social value are those things that would tend to make you want to uplift man and not debase him" (T. 113).

Through his occupation, Mr. Evans comes in contact with people from all sections of the community (T. 104). Based upon his knowledge of the community he concluded the movie in question was far below community standards (T. 104). This evaluation was based upon his conversations and associations with people throughout the community (T. 105).

Nineteen-year-old Edwin L. Guill, who has lived in Danville all 19 years of his life, found the movie to be debasing and very offensive (T. 117-118). It was an appeal to abnormal sexual activities.

On cross-examination Mr. Guill admitted having seen the motion pictures "Head Mistress," "Midnight Cowboy" and "Killing of Sister George." When asked to compare them with the movies in question, he stated that while all of these movies were an affront to community standards, "Anomalies" was more gross and obnoxious than the others (T. 119-122). After discussing this type of movie with many people in the community, he was convinced that it not only affronted community standards, but was very offensive to the community (T. 118).

Vincent Chet Smoral moved to Danville from New York 24 years prior to trial. He served as athletic director for two years and director of the city recreation department for five years. Since that time he has been associated with an insurance company. Mr. Smoral described the movie as about as animalistic and degrading as you could find anywhere (T. 137). He emphasized the scene which portrayed a man beating a woman in order to produce orgasm through sadistic treatment (T. 137). There was no plot to the movie and it just went from sadism to lesbianism, to voyeurism, to masturbation (T. 142). The various portrayals of abnormal sexual activity were of no educational value. They were, in fact, very suggestive (T. 138). Based upon his associations and experience with the people of Danville, Mr. Smoral was confident the movie affronted community standards (T. 139).

Dr. Victor E. Mantiply testified that he had been the pastor of Moffett Memorial Baptist Church for the past six years. In his capacity as pastor he comes in contact with many people from all walks of life including, but not limited to, the 1100 members of his own church. He described the movie as "an attempt in an obscene way to show every form of sexual deviation with the intent of saying this is the kind

of normal thing in society, to be a deviate" (T. 149). Based upon his experience and knowledge of the people of Danville, he felt the movie was offensive to the community (T. 150).

In response to defense counsel's question, Dr. Mantiply defined redeeming social value as "a social value that's uplifting to mankind." "Anomalies" possessed neither redeeming social value nor educational value (T. 149-150).

E. Linwood Wright, a research chemist with Dan River, Inc., had lived in Danville 15 years. Through his job associations, his church activities, and contacts in civic clubs he came in contact with a cross-section of the community (T. 153). Based upon his knowledge of the community, Mr. Wright stated the movie definitely affronted community standards (T. 158).

Mr. Wright described the movie as depicting masturbation, voyeurism, lesbianism, homosexuality, exhibitionism, troixism and just about all other aberrations (T. 154). The scenes involving troixism encouraged group sexual activity, which included sodomy. The exhibitionism portrayed not only sodomy, but also arousal of a female breast in front of a mirror (T. 155). The movie tended to be suggestive. For example, the scene of a peeping tom suggested that there were certain frills associated with it. It appealed to a sense of arousal, and, in other words, it "might be fun to try" (T. 155-156). Some would probably respond with a rather severe reaction of excitement. It could even have the psychological effect of turning someone on (T. 157).

Both Betty L. Goins and Nancy J. Chaney testified the movie affronted contemporary community standards (T. 166, 174). Mrs. Chaney stated the movie had no redeeming social value. It appealed to animal instincts and its purpose was to promote this sort of conduct.

Mr. C. H. Grasty, who had lived in Danville for 84 years, testified that there was nothing uplifting or educational about the movie. Based upon his knowledge of the community, the movie was not acceptable in any way (T. 180).

Frank Cuthrell was principal of Westmoreland Elementary School and had lived in Danville for 11 years. He described the movie as gross and without educational or social value (T. 183). The theme of the film was to suggest that what the actors were doing on the screen was what everyone should be doing (T. 183, 186). This witness's knowledge of the community lead him to the conclusion that the movie affronted contemporary community standards (T. 184).

Major T. N. Morris of the Danville Police Department testified that "Anomalies" came to Danville around the middle of December and was scheduled to leave on January 5, 1971. He saw the movie on the night of January 4 and talked with the defendant, Price, who was the manager of the North Theatre (T. 237).

Morris found the dominant theme of the movie to be an appeal "to a lustful prurient interest in sex that displayed nudity and abnormal offenses which were crimes, according to the Statutes of Virginia . . ." (T. 238). This theme had the effect of sexually arousing those who viewed it. For example, on the night that he saw the movie the viewers became unruly and were making loud statements. The expressions were vulgar and were made while the movie was playing (T. 246-247).

The police officer described the movie as a portrayal of different forms of abnormal sex, such as fellatio, cunnilingus and troixism. One scene depicted a man having normal intercourse with a woman while another man was having relationship through her anus. Other scenes showed sadistic acts which suggested certain criminal activity (T. 245).

Major Morris established his knowledge of the community by pointing out that he had worked in all sections of the city and knew people throughout the community. He had discussed on many occasions, with thousands of people, the subject of obscene movies and obscene literature (T. 238). From his conversations with and knowledge of the people, he felt "Anomalies" not only affronted community standards, but was offensive to the people of Danville (T. 238). The movie had absolutely no redeeming social value. It appealed to only the abnormal tendencies of a person (T. 238).

To rebut the Commonwealth's testimony, the defense called Dr. Myron B. Liptzin, a psychiatrist from the University of North Carolina. This witness found the movie most helpful in developing individuals through exposure. He felt this brought about a greater freedom of discussion among married people (T. 201-203). To Dr. Liptzin, this made the movie educational and entertaining. He did admit, however, that after seeing films of this nature there was an initial period of excitement or arousal which persisted approximately 24 hours (T. 204). He denied, however, that films of this nature change a person's already formed patterns of behavior or caused sex crimes (T. 206-208). On cross-examination, he did admit that some psychiatrists, sociologists, teachers and criminologists such as J. Edgar Hoover felt that obscenity which placed its emphasis on morbid sex, particularly abnormal and perverted practices, may induce anti-social conduct by the average person (T. 218-219). He disagreed with their conclusions, however.

In trying to explain the 24-hour period of arousal caused by such movies, Dr. Liptzin negated the dangers involved by stating that it is usually dissipated by masturbation (T. 221). The setting in which the film is viewed, he explained would determine if masturbation was to take place inside

or outside the theater. The doctor also suggested that movies of this nature may keep businessmen away from prostitutes (T. 230-232).

David Flick, who had been the Director of the Danville Public Library for about three years, was the net witness called by the defense. He testified to the contents of the report of the National Commission on Obscenity and Pornography (T. 260). This report indicated that there was no relation between pornography and anti-social behavior. Mr. Flick was allowed to read the report even though he had no knowledge of its contents.

Flick's knowledge of the community led him to believe that community acceptance of pornography had changed because there was a reserve list for the book "Portnoy's Complaint." Yet on cross-examination, he could not say how many people had read "Portnoy's Complaint" even though he was the only one who had the circulation records for the book.

ARGUMENT

I.

The Virginia Obscenity Statute Involved In The Prosecution Herein, As Construed By The Supreme Court Of Virginia Both Prior To And In The Instant Case, Was Constitutional As Applied To Materials Depicting Or Describing Sexual Conduct As In This Case.

In the Virginia Supreme Court's initial decision in the instant case, the obscenity test to be utilized in Virginia was described in the following terms:

> "As more recent decisions of the Supreme Court have reflected divergent opinions which failed to gain majority approval we have felt constrained to follow the

definition of obscenity set forth in *Roth*, 354 U.S. at 489, 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.' *Roth* has been reaffirmed in *United States* v. *Reidel*, 402 U.S. 351 (1971). We have also acquiesced in the following amplification of the *Roth* definition set forth in a plurality opinion in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure* v. *Massachusetts*, 383 U.S. 413, 418 (1966);

> '. . . [T]hree elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'

House v. *Commonwealth*, 210 Va. 121, 125, 169 S.E.2d 572, 575 (1969). See *Hearn* v. *Short*, 327 F.Supp. 33, 36 (S.D. Tex. 1971) (Concurring opinion of Bue, J.)." (213 Va. at 115).

This exposition of the test for obscenity in Virginia in *House* and *Price* amounts to a judicial construction of the definition of obscenity contained in § 18.1-228 of the Code of Virginia (1950), as amended, so as to preserve the constitutional viability of that statute (See *Grove Press, Inc.* v. *Evans*, 306 F.Supp. 1084, 1086 (E.D. Va. 1969)). It is unquestioned that up until the decisions of this Honorable Court in June of 1973, this was the test for obscenity approved by Your Honors. The essential question then becomes whether the decisions in *Miller* v. *California*, 413 U.S. 15 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8-mm Film*, 413

U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Alexander* v. *Virginia*, 413 U.S. 836 (1973), so drastically changed the state of the law as to make the test applied to this case in the Circuit Court for the City of Danville, Virginia constitutionally deficient.

It may be useful at this point to quote a lengthy portion of Chief Justice Burger's decision for this Court in *Miller* v. *California*, *supra*, to set forth the parameters of valid constitutional enforcement of obscenity laws:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. [Citations omitted] We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc* v. *Dallas*, *supra*, 390 U.S. at 682-685, 20 L.Ed.2d 225 (1968). *As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law*, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: *(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest*, *Kois* v. *Wisconsin*, *supra*, 408 U.S., at 230, 33 L.Ed.2d 312 (1972), quoting *Roth* v. *United States*, *supra*, 354 U.S., at 489, 1 L.Ed.2d 1498 (1957); *(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable*

state law, and *(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value*. We do not adopt as a constitutional standard the *'utterly* without redeeming social value' test of *Memoirs* v. *Massachusetts, supra*, 383 U.S., at 419, 16 L.Ed.2d 1 (1966); that concept has never commanded the adherence of more than three Justices at one time.... If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary [citations omitted].

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. [citations omitted]...."

(413 U.S. at .....; emphasis supplied).

It is evident that the tests newly articulated by Your Honors in *Miller* differ from the tests described by the Supreme Court of Virginia in the *House* case and in its initial decision in the *Price* case in only two respects. The first of these is a substitution of the terminology as to whether the work, "taken as a whole, lacks seriously literary, artistic, political or scientific value" as opposed to the standard described by the Supreme Court of Virginia as a plurality determination in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966), that the work must be "utterly without redeeming social value." This substitution, contrary to the argument made by petitioner in this proceeding, is not of constitutional dimensions. In *Miller*, Your Honors did not hold the "utterly without redeeming social value" test to be unconstitutional but you merely recognized the obvious fact that it was practicably unworkable, and a more rational test was substituted therefor. The new test is far less restrictive than the earlier *Memoirs* test and imposes a lighter burden on the prosecution. The second change made by Your Honors in *Miller* was to explicitedly limit the application of these tests to materials which depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state law." The second alteration is not actually a change in the test but is merely a clearer delineation of the type of materials to which the test may be applied.

Applying the *Miller* standards to the instant case, it is clear, first, that the film, "Anomalies" is clearly lacking in "serious literary, artistic, political, or scientific value" since the jury in the Circuit Court for the City of Danville and the Supreme Court of Virginia both found that the material was "utterly without redeeming social value," a much harsher standard. Second, did the film "Anomalies" depict

or describe "in a patently offensive way, sexual conduct"? The Supreme Court of Virginia viewed the film prior to its initial decision, and in its opinion that Court described the film as follows:

> "The film purports to show that many abnormal sexual activities, which were formerly engaged in furtively, are now more widely practiced by persons who are no longer restrained by any sexual 'hangups' or feelings of guilt. The activities are then explicitly demonstrated in a series of unrelated scenes in which the advantages ascribed to the deviant practices by devotees are mentioned. Except for occasional repetitive words uttered by the narrator, the sound track is limited to background music and assorted moans, groans, and grunts supposedly emanating from the performers.
>
> "The testimony of Commonwealth witnesses accurately described 'Anomalies' and we need not elaborate further. Under the *Roth-Memoirs* test we find that the film is obscene. Its dominant theme or purpose, taken as a whole, appeals to a prurient interest, that is, a shameful or morbid interest, in sex. It is patently offensive because it affronts contemporary community standards relating to the description of sexual matters, whether the applicable community standards are local, statewide or national. The film is utterly without redeeming social value. If satisfying the salacious curiosity of the audience gives redeeming social value to 'Anomalies', as Dr. Liptzin suggested in his testimony, then there can be no conviction under the obscenity statute for exhibiting any motion picture. No doubt the film has entertainment value for sexual deviants and for other persons who may enjoy viewing simulated acts of sexual perversion. . . ." (213 Va. at 118-119).

This accurate description, in general terms, is substantially identical to the descriptions used by Chief Justice Burger in

his opinion in *Miller* as to the type of materials that may constitutionally be prohibited and prosecuted.

The only remaining question, then, is whether the Supreme Court of Virginia properly applied the *Miller* test, if in fact they were substantially new tests, to this conviction which preceded the Miller decision. First, as previously pointed out, the only newness in the test is a change regarding the social value of the materials in question and that change is to the detriment of the appellant here. The judgment affirmed by the Supreme Court of Virginia in its initial decision was predicated on a test that created a much more extensive burden for the Commonwealth than does the *Miller* test with regard to "social values." Thus, this petitioner had the benefit of a more restrictive test and has no standing to complain with regard to this change. (See 214 Va. at 494). The other variation was not in the test but in the definition of the material to which the test could be applied and the Supreme Court of Virginia had already earlier described the film involved in this case in such terms as to easily meet the *Miller* test.

Several courts have, on remand, dealt with the problem of applying *Miller* to prior convictions. The overwhelming majority of those courts have reaffirmed pre-Miller convictions on grounds similar to those enunciated by the Supreme Court of Virginia (*United States* v. *Thevis*, 484 F.2d 1149 (5th Cir. 1973); *Gibbs* v. *State*, ... Ark. ....., 504 S.W.2d 719 (1974); *People* v. *Enskat*, 109 Cal. Rptr. 433 (Calif. Ct. App. 1973); *Rhodes* v. *State*, 283 So.2d 351 (Fla. 1973); *Slaton* v. *Paris Adult Theater*, ... Ga. ....., 201 S.E.2d 456 (1973); *Hall* v. *Commonwealth*, 505 S.W. 2d 166 (Ky. 1974); *Ebert* v. *Maryland State Board of Censors*, 19 Md. App. 300, 313 A.2d 536 (1973); *Commonwealth* v. *Claflin*, 298 N.E.2d 888 (Mass. App. 1973); *State* v. *Bird*, ... Mo. ....., 499 S.W.2d 780 (1973); *People*

v. *Heller*, 33 N.Y.2d 314, 307 N.E.2d 805 (1974); *State* v. *Bryant*, 20 N.C. App. 223, 201 S.E.2d 211 (1973); *Keating* v. *Vixen*, 35 Os. 2d 215, 301 N.E.2d 880 (1973); *State* v. *Watkins*, ... S.C. ....., ... S.E.2d ..... (1973); *State* v. *J-R Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (1973). Similarly, in *Kirkpatrick* v. *New York*, 414 U.S. ..... (1973), your Honors dismissed an appeal, for want of a substantial federal question, in which an attack was made on the New York statute's definition of obscenity which was in substantially the same terms as that of the Virginia statute. Thus, it is respectfully submitted that the Supreme Court of Virginia correctly ruled that the Virginia obscenity statute, as construed by them, was constitutional, and that it was properly applied to the film in the instant case so as to affirm the judgment of conviction.

II.

The Virginia Supreme Court Properly Ruled That The Failure Of The Trial Court To Include The Element Of Knowledge In Its Instruction To The Jury Was Harmless Error Beyond A Reasonable Doubt.

The Virginia Supreme Court properly ruled that the trial court had erred in failing to include in Instruction No. 1 the element of knowledge on the part of the petitioner, who was the manager of the theater at which the film in question was shown. As pointed out, the petitioner was in fact the manager of the theater and the film in question, "Anomalies" was shown for a period of several weeks, it was advertised as X-Rated and potentially offensive to some people and the petitioner had hired a security guard to prevent unmarried persons under 21 from entering the theater. Thus, the evidence of scienter was overwhelming and the failure to instruct on the element of knowledge was clearly harmless error.

III.

The Refusal Of The Trial Court To Instruct The Jury, In Response To Petitioner's Request, On The Absence Of Pandering And On The Precautions Taken To Insure That Juveniles Did Not See The Film As Being Material To The Question Of Obscenity Was Proper In That These Elements Are Not Relevant Under The Roth-Memoirs Tests.

The petitioner at trial requested the trial court to instruct the jury "that whether petitioner took adequate precautions to insure that the film could not be viewed by juveniles and whether he took adequate precautions to see that no unwilling adult was exposed to the film and whether he used pandering or offensive advertising material to promote the film were issued which the jury could take into account in determining whether or not the film was obscene" and the trial court refused the instruction on the grounds that these elements were not a part of the *Roth-Memoirs* test for determining obscenity. The Supreme Court affirmed the trial court's action on the same basis. The action of these courts was quite correct under your Honors' decision in *United States* v. *Reidel,* 402 U.S. 351 (1971). In that case, the defendant was charged with the violation of 18 U.S.C. § 1461, which prohibited the knowing use of the mails for the delivery of obscene matters. Reidel had advertised in the newspaper that a person seeking his illustrated booklet must be over 21 years of age and one of the booklets had been mailed to a postal inspector stipulated to be over 21. The District Court dismissed the indictment and concluded that § 1461 could not be constitutionally applied "where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults . . . ." This Court rejected the reasoning of the District Court and reversed the judgment, holding

that *Roth* squarely placed obscenity and its distribution outside the reach of the First Amendment and refused to overrule or modify *Roth*. The Court explicitly held that whether the laws of obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age was a legislative matter and not one for this Court to determine. Consequently, the Courts below did not err in any Constitutional sense by refusing to engraft further elements to the *Roth-Memoirs* test.

IV.

The Virginia Trial Court Properly Granted And Gave Instruction No. 2 For The Commonwealth As It Was A Correct Statement Of The Law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, Counsel for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of

the United States, do hereby certify that on the 14th day of June, 1974, I mailed three copies of the foregoing brief for the respondent in opposition to the granting of a petition for a writ of certiorari to Norman B. Smith, Esquire, Smith, Carrington, Patterson, Follin and Curtis, 704 Southeastern Building, Greensboro, North Carolina 27401 and to John W. Carter, Esquire, Carter and Wilson, 124 South Market Street, Danville, Virginia 24541, Counsel of Record for Petitioner.

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